IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 09-0239

STATE OF MONTANA,

Plaintiff and Appellee,

v.

STEVEN CORPRON,

Defendant and Appellant.

APPELLANT'S BRIEF

ON APPEAL FROM THE MONTANA FIFTH JUDICIAL DISTRICT COURT, JEFFERSON COUNTY, HONORABLE LOREN TUCKER, PRESIDING

APPEARANCES

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I. STATEMENT OF THE ISSUES

The District Court erred in joining all charges in one trial. Alternatively, if the charges were properly joined, the District Court erred in denying Mr. Corpron's motion to sever the charges.

Mr. Corpron's state and federal constitutional rights were violated by his absence during contact between the judge and the jury during deliberations. The District Court erred when it denied Mr. Corpron's motion for a new trial on this basis.

II. STATEMENT OF THE CASE

Steven Corpron was charged with two counts of sexual intercourse without consent, involving different complainants, in one case. Subsequently, Corpron was charged with a count of sexual intercourse without consent in a separate case. The court granted the state's motion to join all three charges, and denied the defense's challenge to joinder and motion to sever the charges.

Following a jury trial, Corpron was convicted on two counts and acquitted on a third count.

The defense moved for a new trial, on the ground that Corpron's constitutional rights to be present, and to a public trial, were violated when the trial judge spoke with the jury in the jury room during deliberations, in Corpron's absence. The court denied the motion.

Steven Corpron now timely appeals his convictions.

III. STATEMENT OF THE FACTS

Pretrial Proceedings.

On March 28, 2006, the state charged Steven Corpron, 18 years old, with two counts of sexual intercourse without consent, in Cause No. DC 06-2058, alleged to have been committed against separate complainants, J.H. and S.S., both of whom were minors, in late October or early November 2005. Docket number ("DC __") 2.

On October 13, 2006, the state filed an Information in a separate case, DC 06-2084, charging Corpron with the offense of sexual intercourse without consent, against T.L., a minor, in September, 2007. DC 2.

Proceedings Regarding Joinder and Severance.

On December 13, the state moved to join the two cases, asserting that Corpron had been charged "with similar crimes that are connected together and constitute parts of a common scheme or plan." Cause No. 06-2058, DC 17. The court granted the motion on January 11, 2007, noting that the defense had not responded or objected. Joinder of the three charges was appropriate, the court held, "to conserve judicial time, lessen the burden for prospective jurors, obviate

the necessity of recalling witnesses and speed the administration of justice." Cause No. DC 2058, DC 18, a copy of which is included in the Appendix as Exhibit A.[1]

The defense filed a motion to vacate the order for joinder, a brief in opposition to the state's motion for joinder, and a cross-motion to sever all charges and hold three separate trials. DC 19, 20. Corpron argued that the charges were misjoined. Under §46-11-404(1), MCA, charges may be joined if the offenses charged are parts of a common scheme. Corpron asserted that the state had failed to establish the charges were all part of a common scheme. DC 20, at 3-5.

Courts look to three types of prejudice in resolving severance issues, and Corpron argued that he would be prejudiced by joinder of the charges in all three ways. First, the accumulation of evidence would lead the jury to conclude that Corpron is a bad person, and wish to convict him of something. Second, the jury would be highly likely to convict Corpron on any of the three charges "simply because it listened to evidence pertaining to another count that might not otherwise be admissible." Third, Corpron might want to testify as to one count, but not other counts. DC 20, at 3, 4.

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[1] For ease of reference, all documents filed after the lower court's initial joinder order will be identified by the docket number in Cause No. DC 06-2058, unless otherwise indicated.

The state opposed Corpron's motions, and adopted a different theory as to why the charges were properly joined. Sec. 46-11-404(1), MCA, permits joining two or more charges in a charging document if they are "of the same or similar character." The state relied on State v. Freshment, 2002 MT 61, 309 Mont. 154, 43 P.3d 968, in which this Court held that rape charges were "of the same or similar character." DC 24, at 2-4. The state also provided additional factual allegations to support joinder. Count I involved J.H., whom Corpron "duct taped" and forcibly penetrated after they watched movies. During this incident, Corpron impregnated J.H. Some time after the incident, Corpon made admissions during a conversation with J.H. Among the witnesses to testify would be a DNA expert regarding paternity. See, DC 24, at 1,5-6, 7.

Count II involved S.S., who was drinking alcohol with Corpon and several other juveniles. When Corpron was alone with S.S., he forced himself on her. S.S. was then raped by a second person, whom the state had been unable to locate. DC 24, at 1, 6, 7-8.

The charge in Cause No. DC 06-2084 involved an incident about one year later, involving T.L. The state alleged that Corpron was alone in T.L.'s bedroom, where he forced himself on her. Witnesses would include a DNA expert. DC 24, at 1, 8.

The state further argued that the charges should not be severed, as Corpron would not suffer prejudice. First, the accumulation of evidence would not prejudice Corpron. Second, regarding the possibility that the jury might use evidence of guilt as to one count, even though that evidence would be inadmissible on another count in separate trials, the state relied on the approach taken in Freshment, in which this Court applied Rule 404(b), M.R.Evid. and the Modified *Just* Rule[2] to determine whether charges should have been severed in order to avoid prejudice to the accused by admission of evidence of other alleged acts. The state argued that under the four parts of this Rule, (1) the charges were similar, in terms of the victims, alleged crimes and location; (2) the offenses were not too remote in time; (3) "the counts show the defendant acted with motive, intent and preparation in taking advantage of the three victims and seeking sexual intercourse when they became alone and vulnerable;" and, (4) the evidence of "three victims of the same crime is probative and outweigh's [sic] danger of unfair prejudice." Finally, any prejudice was mitigated by the "simple and distinct" nature of the evidence. DC 24, at 6-9.

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[2] State v. Matt, 249 Mont. 136, 814 P.2d 52 (1991); State v. Just, 184 Mont. 262, 602 P.2d 957 (1979).

In a reply brief, Corpon asserted that the state's claim that a second man was involved in the rape allegation concerning S.S. was "highly prejudicial." DC 25, at 3.

The parties submitted the issues on the briefs. DC 23. The court denied the defense motions during a hearing.[3]

The court applied factors identified in State v. Southern, 1999 MT 94, 294 Mont. 225, 980 P.2d 3, and determined that the charges were of the same or similar character. All three charges were brought under the same statute. The charges involve similar victims, locations, or modus operandi. The incidents all occurred within a narrow time frame of approximately a year. All incidents occurred within a limited geographical area in Boulder, Montana. 2/21/07 Tr., at 4-6.

Turning to the issue of whether Corpron would be unfairly prejudiced by joinder, the court analyzed three factors set out in *Southern*. First, based on the facts and holding in *Southern*, the court held that in Corpron's case there would be no prejudice due to an accumulation of evidence. Next, the court found that

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[3] The court did not enter a formal Order. The oral ruling constituted "the determination and order of the Court on Defendant's motion to sever." 2/21/07 Tr., at 3:23-25. A copy of the portion of the transcript in which the court articulated its ruling, is included in the Appendix to this Brief as Exhibit B.

Corpron had not alleged that evidence inadmissible on one count might be used against him on another count, and even so, this problem could be addressed by proper jury instructions. Third, Corpron had not alleged that he wished to testify regarding one charge but not another. 2/21/07 Tr., at 6-9.

Trial Developments

In his opening statement, the prosecutor revealed another new factual allegation, with regarding to the incident alleged in Count I. According to the prosecutor, Corpron went to J.H.'s house, suddenly attacked her and tied her hands with a rope, and raped her. Trial Transcript ("Tr. "), at 205-206.

Corpron contended that consensual intercourse occurred with J.H. and with T.L. Tr., at 211, 215, 221. Consent was not an issue on the charge relating to S.S., given her age, and Corpron asserted simply that he did not have sex with her.

Trial Testimony.

S.S. S.S., who was born in February, 1992, was the state's first witness. She testified that in the fall, 2005, she went to a party for an acquaintance who had turned 18. At this party, S.S. got "pretty drunk." S.S., her friend Nikki M., Alex Pullen, and Corpron were in a bedroom in the trailer playing video games. The bedroom did not have a door. Tr., 232-40. At some point Alex and Nikki left the

room. S.S. claimed that Corpron pulled her on to a bed, held her arms over her head, pulled off her pants, and then had sex with her, against her will. Afterward, Alex Pullen entered the bedroom and had sexual intercourse with S.S., while Corpron was still in the room. According to S.S., when Pullen was done, he and Corpron sat in the room and smoked cigarettes while S.S. lay on the bed crying, and then they covered her with a blanket. S.S. said she went home and recorded what had happened in a journal, but she did not include any names, and did not date this entry. S.S. did not know when the incident happened, other than it was sometime in late October, 2005. Tr., at 240-46; 264-65; 294.

Nikki M. testified that Corpron was present in the room while S.S. and Nikki played video games. Alex Pullen became ill from alcohol, so Nikki assisted him in the bathroom. She said Pullen then returned to the couch, and she thought he passed out. When she returned to the bedroom, the lights were off. There was no door, but a blanket hung over the entry. Nikki knocked on the wall, and Corpron told her to go away. She did not hear anything beyond that. Nikki did not call to S.S. to see if she was okay, nor did Nikki hear anyone scream or call out. Tr., at 318-23.

Katrina F. also was at the party with Corpron. She recalled it being in the first part of September. She did not ever see Corpron and S.S. in the back room.

She saw Alex Pullen, who threw up and spent much of the night in the bathroom. Corpron left the party with Katrina and others. Tr., at 960-81.

S.S. testified about a subsequent encounter with Corpron, which occurred at her home, when Corpron arrived with a friend on New Year's Eve. She said Corpron sat with her in the living room, "said he was sorry for what he had done," and that he was going to beat up Alex Pullen. While others were present, S.S. said that none heard Corpron apologize. S.S. admitted at trial that in a later statement to the police, she did not tell them that Corpron had apologized. Tr., at 252-54; 272-74.

S.S. claimed that in January her father found about the alleged October incident, when he discovered her journal and read the entry she had made. Tr., at 254-55. She also spoke with J.H. about her allegations. Tr., at 267-68, 279. At some point, S.S. and J.H. and their fathers jointly decided to go to the police. S.S. gave a statement to police in January, 2006. Tr., at 257, 261-62; 375-76.

J.H. In October, 2005, J.H. was 17 years old. One afternoon, she was sitting outside her house drinking beer with Tommy L. and Tyler J, who were about 13, when Corpron came by. Tr., at 420. J.H. said that after Tommy and Tyler left, J.H. and Corpron went inside and began to watch a movie. J.H. received a

phone call, and she said that while she was talking, Corpron took the phone from her and hung up. J.H. testified that Corpron had a rope in his hands, and he threw her down on the ground. He tied her hands behind her back with the rope, then flipped her over and removed her pants and underwear. He then had sex with her, against her will. When he was done, he grabbed beer from the refrigerator and ran away. Tr., at 369-71.

The state also presented testimony from S.S., Tyler J. and Tommy L., about seeing Corpron outside J.H.'s house. S.S. said she saw Corpron at J.H.'s house, the same day she believed was the day that J.H. claimed Corpron raped her. Tr., at 266-67. While Tyler and Tommy saw Corpron outside the house one day, both boys recalled that Corpron did not go inside. Tr., at 489-91; 564-68. The next day, according to Tommy, Corpron told Tommy and Tyler that he had got drunk and had sex with J.H. the day before. Tr., at 564-68.

J.H. did not immediately report the incident to her father, her friends or the police. She learned in December that she was 2 ½ months pregnant. She told her physician that she had been raped in November. Tr., at 407; 753-54. J.H. gave this same date in a statement to police. In this statement, she also claimed, falsely, that Corpron had placed duct tape over her mouth. She admitted at trial that this was a lie. Tr., at 380; 422-23; 620.

J.H. gave birth in July. A paternity test was done, and results showed Corpron likely was the father of the child. Tr., at 383; 786. The date of conception was determined to be perhaps as early as September 30, to sometime during the first week in October. Tr., at 749-50.

J.H. claimed that about two weeks after she was raped, Corpron came by with Lee Rollins and Alex St. Germaine. Corpron confronted her about "telling everybody that I raped you" and slapped her. J.H. said that S.S. was present, and she slammed the door in Corpron's face. The three boys showed back up 15 minutes later, came into the house and demanded beer. J.H.'s dad arrived, so the boys ran out. S.S. grabbed a knife and followed them. Tr., at 377-78; 430-31.

S.S. also testified about this encounter. She claimed that she was present and overheard, but did not see, an argument between J.H. and Corpron. S.S. said she heard "a smack" which was Corpron slapping J.H. S.S. denied J.H.'s claim that S.S. had chased the three boys out of the house with a knife. Tr., at 249-52; 273.

Lee Rollins told the jury that he accompanied Corpron and Alex St. Germaine to J.H.'s house. At the door, Corpron asked J.H. about rumors going around that he had raped her, and she responded that she was not the one who had started the rumor. J.H. was not upset. Corpron did not slap J.H., they did not get

chased away by S.S. brandishing a knife, and they did not later return, break into the house and steal beer. Tr., at 995-1000.

J.H. subsequently tried to get the charge against Corpron dropped. She made this request to the prosecutor, but was told that she could be prosecuted for making false allegations. Tr., at 384-85; 396. She later said this was in regard to her false allegation that Corpron had placed duct tape on her mouth. Tr., at 482.

Katrina F., who was a friend of J.H.'s in high school, testified that J.H. initially told her that Corpron had raped her. After J.H.'s baby was born, J.H. told Katrina that she had tried to drop the charges, because Corpron had never raped her, and she had been scared at first. She didn't know what her dad was going to do, and she didn't know how she was going to raise a baby, so she lied. Tr., at 959-60; 982-83.

T.L. T.L., who was 16 years old, claimed that on September 19, 2006, she was in bed at about 10 p.m. Her younger brother, Tommy, was in the living room watching television, and her 15-year-old boyfriend, Kyler S., was in an adjacent shed, where he was living. Tr., at 494-98; 533-34. Corpron arrived at the house. It was not unusual for him to be there, for he had been helping T.L.'s mother dig a hole in the front yard. Tr., at 496. That night, he came into her bedroom, left the

door open, and T.L. said she told him to get out. Instead, Corpron rubbed her legs and kissed her neck. She told him to stop, but he pulled down her pants and had sex with her. She said she tried to scream, but Corpron had his hand over her mouth. Corpron then had a cigarette, and left the room. T.L. went out and told Tommy and Kyler what had happened. She said she heard Corpron saying he was sorry he had raped her. Tr., at 499-507. Later that night, she gave a statement to police, but omitted any claim that she overheard him telling Tommy and Kyler that he was sorry for what he had done. Tr., at 535-37; 546.

Mandy W., whom T.L. called her "best friend," encountered T.L. minutes after the alleged incident. T.L. told her Corpron had raped her, and showed Mandy a wet spot on the bed. To Mandy, it looked like T.L. had dumped water on the bed. Tr., at 525, 812-818.

T.L. then went to the hospital for a medical examination. In response to a question from the nurse, T.L. said she had not engaged in sexual intercourse with anyone else in the past 5 days. Tr., at 516-23. Subsequent DNA analysis of vaginal swabs from T.L. revealed a DNA mixture from at least two individuals, one of whom was Corpron. T.L. later admitted that she and Kyler had sex the night before the incident with Corpron, and that her statement to the nurse was a lie. Tr., 523, 540-41; 553; 669-700.

Kyler told the jury that Corpron explained to him that he had come over to get paid for work done. He had asked T.L. for a cigarette and sat at the foot of the bed, having a conversation. Corpron apologized for sleeping with T.L, but said nothing about a rape. Tr., at 1012-1016.

Tommy related that Corpron came over the house because he was helping Tommy and his mom dig a pipeline. Tr, at 569. Corpron sat and watched TV with Tommy for a while, and then he went into T.L.'s room. Tommy said he heard a faint cry about 5 minutes later, and then Corpron came out crying, and said "'I did it again. I'm sorry. I didn't want to.'" T.L. then came out and said that Corpron had raped her. Tr., at 569-72. According to Tommy, Corpron later said he was really sorry he had raped T.L., and he would go to the police and confess. Tr., at 573. Tommy admitted that in a statement to police, he did not tell them that Corpon made any admissions. Tr., at 581.

Corpron called his father from T.L.'s. Tr., at 852. Corpron's dad testified that Corpron was crying and upset when he arrived to pick him up. Steve told his dad that he had gone to T.L.'s because T.L.'s mother owed him money for work he had done. She would not be home until ten or eleven, so they told Corpron he could wait. T.L. invited him back into the bedroom for a cigarette, and when he went into the bedroom, T.L. initiated sex. Afterward, T.L. went to the garage and

told Kyler that Corpron had just raped her. Tr., at 852-55. Corpron's brother Silas, who was present, confirmed Steven's narrative. Tr., at 877-881.

Corpron was interviewed by law enforcement after having been advised of his rights. He acknowledged going to T.L.'s home, and told police he had consensual sex with her. Tr., at 795-96; 802. At trial, Corpron's mother testified that Corpron left Boulder at the end of September, and did not return home until around Christmas. Tr., at 834-35. His sisters confirmed his absence from Boulder during this time period. Tr., at 864-70; 885-87. Corpron's father established that Corpron lived and worked with him in Billings from late September to Christmas. Tr., at 845-49.

Credibility Disputes.

J.H. cast doubt on T.L.'s story. When J.H. tried to get the charge against Corpron dropped, she told the prosecutor that she did not believe T.L.'s story about being raped by Corpron. At one time, J.H. and T.L. were really good friends. However, T.L. had told J.H. that T.L. reported she was raped "to back up" J.H.'s story. J.H. also said that T.L. admitted having consensual sex with Corpron. Tr., at 388-90; 444-51; 478-79.

In response, T.L. cast doubt on J.H.'s version. T.L. denied that she told J.H. that she had consensual sex with Corpron, and that she was claiming rape to help

J.H.'s case. T.L. testified that she heard J.H. "bragging" about being raped. T.L. had known J.H. since she was two years old, and did not believe her. Tr., at 527; 543; 548-49.

Submission to and Deliberations by Jury.

The jury was instructed that "each count charges a distinct offense. You must decide each count separately. The Defendant may be found guilty or not guilty of any or all of the offenses charged. Your findings as to each count must be stated in a separate verdict." Cause No. DC 06-2084, DC 57, Instruction 21.

The case went to the jury on Friday, October 19, at 2:28 p.m. The jury submitted three notes, including one which inquired: "We don't have any evidence relating to [S.S.] We thought there was a voluntary statement. If there is any can we see it please?" Verdicts were returned at 8:05 p.m. Corpron was convicted on Counts II, regarding S.S., and III, regarding T.L. He was acquitted on Count I, regarding J.H. DC 62, 63; Tr., at 1108-1114.

Proceedings Related to Corpron's Motion for a New Trial.

As revealed in filings related to Corpron's motion for a new trial, the judge, accompanied by a bailiff, went to the jury room and spoke with jurors at about 7:00 p.m. Corpron moved for a new trial, asserting that this meeting in his absence

violated his fundamental constitutional rights to be present and to a public trial. He provided an affidavit from the bailiff, which affirmed the meeting. DC 65.

The state did not contest that the judge spoke with the jurors during deliberations. Instead, the state opposed the motion by asserting that counsel and the judge agreed that the judge would check on the need to make dinner arrangements for the jury, and to tell them they would not have to deliberate all night. Later, the judge informed counsel that he had done so, and defense counsel posed no objection at any time. DC 66, Ex. 1.

The state submitted affidavits from the 12 jurors. Each affidavit contained an identical assertion that the judge, accompanied by the bailiff, opened the door to the jury room at about 7:00 p.m., and "inquired into whether dinner should be ordered or whether the jury was close to reaching a verdict." Ten of the jurors and the bailiff provided an identical assertion of the content of discussion which ensued between a juror and the judge: "One of the jurors asked what would happen if they did not reach a verdict that evening. Judge Tucker advised that the jury would then come back another day for deliberations."[4] One juror provided a more detailed account of the discussion which followed the judge's inquiry.

[4] DC 66, Exs. 3-12; 14.

> One of the jurors asked "Would we be required to stay in the jury room until 2:00 am or would we be returning on Saturday". Judge Tucker advised "A Saturday deliberation was not totally out of the question but not likely and given the commitments of the court it would be unlikely that the jury would return to deliberations before Wednesday. Judge Tucker then asked "Are you making progress with your deliberations or should the court be considering contingency arrangements should you be unable to reach a verdict this evening". The Foreperson then asked the jurors, "Does everyone want to continue on" and the response from everyone was "Yes".

DC 66, Ex. 2. The remaining juror provided a brief narrative of the discussion. DC 66, Ex. 13.

Each of the jurors stated, in identical language, that "[a]t no time did I feel rushed or pressured by Judge Tucker's inquiry and at no time did the Judge's inquiry affect my deliberations." Five jurors said when the judge appeared during deliberations, they had already voted to convict Corpron on one count, and were close to reaching verdicts on the other two counts.[5] Six juror said they had already reached verdicts on the two counts on which Corpron was convicted, and had begun deliberating on the remaining count.[6] One juror said that the jury had

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[5] DC 66, Exs. 3, 7, 9, 11, 13.

[6] DC 65, Exs. 4, 5, 6, 8, 10, 12.

decided on one guilty verdict, were close to a second verdict, and had voted twice on the charge on which Corpron was found not guilty.[7]

At a hearing on the motion, counsel for the parties stipulated that the court had contact with the jury during deliberations. Tr., at 1148; 1160-61. Counsel had differing recollections as to whether the judge's contact was made with the approval of all counsel, while the court stated that the discussion with the jury was done with agreement of both counsel. Tr., at 1128-29; 1149-50; 1153. The defense contended that the jurors' affidavits should be considered only to establish that this contact occurred. Tr., at 1123-26; 1131-33; 1160-63. The state argued that the affidavits should be considered fully, and the jurors' statements demonstrated that Corpron was not prejudiced by the judge-jury contact. Tr., at 1150-52. The prosecutor described the contact merely as "an open door conversation about dinner." Tr., at 1156. The defense asserted that a defendant has the right to be present when the court makes a determination with the jury about how long deliberations will take. See, Tr., at 1164-65.

The court denied the motion. DC 71, a copy of which is included in the Appendix as Exhibit C. The court reviewed the factual allegations and summarized decisions of this Court regarding the right to be present at trial. The

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[7] DC 65, Ex. 2.

court essentially held that the "momentary encounter concerning whether supper should be ordered or informing the jury that they did not have to stay all night" was not a critical stage, at which Corpron had a right to be present. DC 71, at 12-15. Further, Corpron was not prejudiced by the judge-jury communication. DC 71, at 17-19.

Corpron was sentenced to concurrent terms of imprisonment. See DC 89, at copy of which is included in the Appendix to this brief as Exhibit D.

IV. SUMMARY OF ARGUMENT

The trial court erred as a matter of law in joining the three charges for trial, and Corpron was denied his right to a fair trial as a result. Alternatively, the court erred in denying Corpron's motion to sever the charges. The state presented an accumulation of evidence of bad acts, which would have been inadmissible if separate trials had been held, and Corpron was unfairly prejudiced as a result.

The trial court also erred in denying Corpron's motion for a new trial, based on the court's communications with the jury in the jury room during deliberations. The contact was a critical stage, during which Corpron was absent, and he did not waive his fundamental constitutional right to be present. As a result his constitutional rights to be present, and to a public trial, were violated.

V. ARGUMENT

A. THE CHARGES WERE MISJOINED UNDER SECTION 46-11-404, MCA.

1. Standard of Review. Determining whether charges were properly joined in a charging document is a question of law which this Court reviews de novo. State v. Southern, 1999 MT 94, ¶ 17, 294 Mont. 225, 980 P.2d 3.

2. The Trial Court Erred in Joining the Three Charges. Sec. 46-11-404(1), MCA permits joinder of offenses against a single defendant, if the offenses charged are (1) "of the same or similar character;" (2) "based on the same transactions connected together;" or (3) constituting parts of a common scheme or plan.[8]

In State v. Southern, *supra*, the Court looked to First Circuit precedent to identify several non-determinative factors to consider in determining whether four counts of sexual intercourse without consent were properly joined as being "of the same or similar character." These factors include (1) whether the charges are brought under the same statute; (2) whether the charges involve similar victims, locations, or modes of operation; (3) whether the charged conduct occurred in a

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[8] Sec. 46-11-404(1), MCA is chiefly an adoption of Rule 8(a), F.R.Crim.P. See, 1991 Commission Comments.

narrow time frame; and (4) whether the charged conduct occurred in a limited geographical area. 1999 MT 94, ¶ 19 (citations omitted). This approach also considers "the extent of common evidence." " United States v. Randazzo, 80 F.3d 623, 628 (1st Cir. 1996).

Applying these factors, the Southern Court concluded that the ages of the four victims were similar, and all were assaulted in a limited geographical area. In each case, the assailant covered the victim's face with an article of clothing and demanded money. Each victim described the assailant similarly. The attacks occurred within a 2 ½ year time frame. "On the whole, the modus operandi and victims" were similar, and the counts were "of the same or similar character" and were properly joined for trial. Southern, ¶¶ 15-21.

Here, the district court denied Corpron's motions, and held that the three charges were "of the same or similar character," based on the Southern factors. As in Southern, the charges all were brought under the same statute. The ages of the complainants in the three cases were similar, ranging in age from 13 to 17. Accord, State v. Duncan, 2008 MT 148, ¶¶ 22-24, 343 Mont. 220, 183 P.3d 118 (ages of complainants similar). At this point, dissimilarities appear, based on the state's representations of the facts, and the court erred in permitting joinder of the three charges.

The method of operation and location were different in each case. The state alleged that the incident regarding S.S. involved multiple assaults, as a second man raped the drunken teenager after Corpron at a house party. Another incident, involving J.H., included Corpron violently attacking the victim and using duct tape to silence her. The third incident, regarding T.L, involved Corpron walking into the girl's bedroom and forcing her to have sex, despite two others being present in the home. See, DC 24. Cf., Duncan, ¶¶ 22-24 (similarity of charges based in part on the fact that all assaults occurred the same location - Duncan's home).

The offenses involving S.S. and J.H. occurred one or two months apart, while the third offense occurred about one year later. However, "mere closeness in time is an insufficient basis for joinder." United States v. Kaquatosh, 227 F.Supp. 2d 1045, 1050 (D. Wis. 2002)(citation omitted).

Corpron presented different defenses, asserting that both J.H. and T.L. consented to sexual intercourse. The Court addressed this factor, in State v. Freshment, 2002 MT 61, 309 Mont. 154, 43 P.3d 968. Freshment asserted that two charges of sexual intercourse without consent, each of which involved 15-year-olds, were dissimilar, in part because one charge involved forcible rape while the other was consensual. This Court affirmed the lower court's joinder of the two

charges. As for the differences in the defense theory, the Court ruled that the distinction between consent and non-consensual rape is not significant under § 46-11-404, MCA, if the consent is not found valid. Corpron was acquitted on the charge involving J.H., so his consent defense may well have been accepted by the jury.

As of the time the joinder issue was presented, there was little evidence in common, and this weighs against joinder of the three charges. For the most part, the witnesses the state intended to call were different. The state represented that witnesses as to the allegation in Count I would include the complainant, J.H., unidentified others who would testify as to a later confrontation between J.H. and Corpron, and a witness to testify as to DNA evidence regarding paternity of J.H.'s baby. Different witnesses would testify as to Count II, including the complainant, S.S., unidentified friends who would testify about S.S. and Corpron being at the house party; and S.S.'s father. As to Count III, the state represented it would call the complainant, T.L., her brother and another who also were present in the home, and a witness regarding DNA evidence. DC 24.

Two witnesses common to all charges were an officer and the prosecutor's paralegal. However, the fact that two investigators were involved in the investigations of offenses committed in a small community should not be weighed

in favor of joinder. A contrary holding under the joinder statute would effectively allow "limitless joinder whenever the charge resulted from the fruits of a single investigation." United States v. Cardwell, 433 F.3d 378, 386 (4th Cir. 2005).

Because there was little evidence in common, the goals of judicial economy and efficiency would not be furthered in this situation. "When all that can be said of two separate offenses is that they are of the 'same or similar character,' the customary justifications for joiner (efficiency and economy) largely disappear. State v. Ramos, 818 A.2d 1228, 1233 (N.H. 2003), quoting United States v. Halper, 590 F.2d 422, 430 (2nd Cir. 1979).

3. The Court Committed Prejudicial Trial Error. For the reasons discussed, the court erred as a matter of law in permitting joinder of the three charges. Joinder of the charges prejudiced Corpron, and violated his constitutional right to a fair trial. Misjoinder rises to the level of a constitutional violation if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial. United States v. Lane, 474 U.S 438, 446, n. 8, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986).

Here, the erroneous joinder of charges was trial error. Trial error is that type of error which typically occurs during the presentation of a case to the jury. This type of error may be reviewed qualitatively for prejudice relative to other evidence

introduced at trial. State v. Van Kirk, 2001 MT 184, ¶ 40, 306 Mont. 215, 32 P.3d 735.

Corpron was prejudiced by the court's decisions to permit the charges to be joined for trial. Separately, the evidence on each charge was not substantial. The jury acquitted Corpron on the count involving J.H. The state's evidence on the count involving S.S., was such that the jury advised the court that "we don't have any evidence relating to [S.S.]" and asked for any statements." Tr., 1111. On Count III, the issue was one of consent. T.L.'s claim that she did not consent was undercut by J.H.'s testimony that T.L. admitted that she had consensual sex with Corpron. T.L. lied about recent sexual activity with her boyfriend.

The court's joinder orders permitted the state to bolster the weak individual cases with significant "propensity" evidence, that would not be admissible in separate trials. For example, in a trial solely on the charge involving S.S., evidence that Corpron allegedly forced intercourse with either J.H. or T.L. would have constituted inadmissible propensity evidence under Rule 404(b), M.R.Evid. Corpron denied having sex with S.S., and asserted that he had consensual sex with both J.H. and T.L. one year apart. There were no issues regarding motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Further, the jury heard evidence at the joint trial that Corpron physically assaulted J.H. in retaliation for her telling people he had raped her. In separate trials regarding the charge in Counts II or III, this evidence would have not have been admissible under the modified Just Rule.

The jury heard testimony from T.L.'s brother to the effect that Corpron admitted the conduct against T.L. for which he was later prosecuted. This admission would have been inadmissible, as irrelevant and unduly prejudicial, in separate trials regarding S.S. or J.H.

Evidence of other acts is highly prejudicial to the accused, and creates the risk that the jury will penalize him simply for his past bad character, or prejudge him and deny him a fair opportunity to defend against the particular crime charged. In terms of quality, such evidence is highly prejudicial. State v. Derbyshire, 2009MT 27, ¶ 51, 349 Mont. 114, 201 P.3d 811. There is "'a high risk of undue prejudice'" whenever joinder of counts allows introduction of evidence which would not be admissible in separate trials. United States v. Lewis, 787 F.2d 1318, 1322 (9th Cir. 1986).

In sum, trial error occurred, and Corpron was prejudiced as a result. The state has the burden to demonstrate that the error was harmless. State v. McOmber, 2007 MT 340, 340 Mont. 262, 173 P.3d 690.

B. THE COURT ERRED IN DENYING MR. CORPRON'S MOTION TO SEVER.

1. Standard of Review. Even if joinder was proper, the trial court may, in its discretion, order separate trials. Section 46-13-211(1), MCA, provides that if it appears that a defendant is prejudiced by a joinder of charges in an information, "the court may order separate trials ... or provide whatever other relief justice requires."[9] This Court reviews denial of a motion to sever counts into separate trials for abuse of discretion. Southern, at ¶ 28.

This Court looks to the evidence developed at trial to determine if the defendant was prejudiced by the trial court's denial of a severance motion. See, Southern, ¶¶ 31-42; Freshment, ¶¶ 29-43; State v. Hocevar, 2000 MT 157, ¶¶ 69-71, 300 Mont. 167, 7 P.3d 329.

2. Corpron Was Prejudiced by Denial of Severance. The accused must prove that the prejudice is so great as to prevent a fair trial. The trial court must balance possible prejudice to a defendant against considerations of judicial economy. Southern, 1999 MT 94, ¶ 28. Such considerations may include "the expeditious administration of justice, reduction of congestion in trial dockets,

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[9] Section 46-13-211, MCA is similar to Rule 14, F.R.Crim.P. See, 1991 Commission Comments.

conservation of judicial time, reduction of burden on citizens who serve as jurors, and avoiding recalling witnesses." Freshment, 2002 MT 61, at ¶ 25.

In State v. Orsborn, 170 Mont. 480, 489, 555 P.2d 509, 515 (1976), the Court first identified three basic types of prejudice which may result from joining charges in one prosecution. First, a jury may consider the criminal defendant facing multiple charges a "bad man" and accumulate evidence until it finds the defendant guilty of something. Next, a jury may use proof of guilt on one count to convict the defendant of a second count even though that proof would be inadmissible at a separate trial on that second count. However, where the alleged facts of the separate offenses were sufficiently distinct to permit the jurors to keep them separate, no prejudice will be found. Third, the defendant may be prejudiced if she wishes to testify on one charge but not on another.

A. Accumulation of Evidence. The cumulative prejudicial effect of evidence on multiple charges generally is insufficient to warrant severance. Southern, at ¶ 32; State v. Taylor, 2010 MT 94, ¶ 28, ___ Mont. ___, ___ P.3d ___. Here, Corpron was prejudiced not merely by the cumulative admissible evidence. He was unfairly prejudiced by the accumulation of inadmissible evidence of bad acts.

S.S., the state's first witness, testified that Corpron forced her to engage in non-consensual sex, and that he then sat idly by while a second man, Alex Pullen, also raped her. Then, the jury heard J.H. describe how Corpron attacked her while they were watching TV. She described how he grabbed her and tied her hands together before he assaulted her. After she told people that Corpron had raped her, he retaliated by hitting her. Then, according to the state's evidence, Corpron showed up in T.L.'s bedroom one night, raped her, then tearfully admitted doing so.

In State v. Yecovenko, 2007 MT 338, 340 Mont. 251, 173 P.3d 684, this Court held that severance of multiple counts would have been proper, because the evidence would have been inadmissible in separate trials and was prejudicial. There, the defendant was charged with two counts of sexual assault, involving young girls, and two counts of sexual abuse of children, unrelated to the assault charges and based on the defendant's possession of images of child pornography. This Court held that the images had no probative value with respect to the sexual assault charges, and would have been inadmissible in separate trials. The jury would have been disgusted with the defendant after viewing the images, a feeling

which was contrary to the obligation to dispassionately evaluate the evidence supporting the separate sexual assault charges. 2007 MT 338, at ¶ 22.[10]

Here, too, the evidence of other acts was not cross-admissible, and would have impaired the jury's ability to dispassionately evaluate the evidence.

B. Use of Inadmissible Evidence. Corpron asserted that the jury would be highly likely to convict him on any of the charged based on evidence pertaining to another charge that might not otherwise be admissible. DC 20, at 4. The state further developed the issue, arguing that evidence would be cross-admissible under the Modified *Just* Rule. DC 24.

Corpron was prejudiced by the admission of evidence of other acts which would not have been admissible at separate trials, under M.R.Evid. 404(b) and the Modified *Just* Rule. Under this Rule, the other acts are inadmissible unless they are similar. This Court looks to the similarity of crimes under joinder analysis, to determine if this factor is met. Southern, at ¶ 36. As the charges were not similar for purposes of joinder, for the reasons discussed above, the other acts evidence likewise was not similar under the Modified *Just* Rule.

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[10] Yecovenko arose in the context of an ineffective assistance of counsel claim, based on a failure to properly identify and assert the type of prejudice the accused would suffer if severance was not granted. This Court concluded that there was a reasonable probability that, but for counsel's errors, the result of trial would have been different.

The other acts evidence also must be admissible for a proper purpose, such as motive, opportunity, intent, knowledge, identity, or absence of mistake or accident. In Freshment, this Court held that evidence offered on two counts of sexual intercourse without consent, involving two minor victims, was not admissible as evidence that the defendant had a common scheme. 2002 MT 61, at ¶¶ 35-38. In Corpron's case, the evidence relating to the other charges of sexual intercourse without consent, and evidence of other bad acts, such as the alleged assault on J.H. in retaliation, would not have been admissible in separate trials, for any proper purpose under the Rule.

As discussed above, evidence of other acts is highly prejudicial, and creates the risk that the jury will penalize the accused simply for his past bad character, or prejudge him and deny him a fair opportunity to defend against the particular crime charged. Derbyshire, *supra*.

This Court has held that prejudice arising from the use of inadmissible evidence will not be found under §46-13-211, MCA where the evidence is simple and distinct, and the counts charged are "of the same or similar character." Southern, at ¶ 41; Freshment, 2002 MT 61, at ¶¶ 39-42. In Southern, the evidence applied only to the specific crimes committed against each victim. 1999 MT 94, at ¶ 42. In Freshment, there was no overlapping evidence, and the only witnesses

who testified as to the two counts were the investigating officers and a crime lab employee. 2002 MT 61, at ¶ 43.

Here, the evidence as presented at trial was not simple and distinct, as there was significant overlap. Additional facts were testified to, over and above what was initially considered prior to trial, when the court denied the defense motion. S.S. testified not only regarding the alleged assault by Corpron, she also told the jury about being at J.H.'s house the day J.H. said Corpron raped her. S.S. then also told the jury that she was present when Corpron hit J.H. for telling people about the rape. S.S. and J.H. each testified about discussing the incidents between themselves, and deciding to report the incidents. J.H. testified as to comments made to her by T.L. regarding the alleged assault.

To determine if inadmissible evidence was simple and distinct, the Court may look to whether a jury instruction was given. Southern, at ¶ 42. Here, the court gave a sole cautionary instruction: "Each count charges a distinct offense. You must decide each count separately[.]" This one instruction was inadequate to address the risk of prejudice generated by the evidence of multiple bad acts. A cautionary instruction does not always suffice to remedy errors. If it were otherwise, "every improper introduction of evidence - no matter how egregious and prejudicial and without regard to any pretrial exclusion - could and would be

cured by a cautionary instruction." State v. Partin, 287 Mont. 12, 21, 951 P.2d 1002, 1007-1008 (1987). Accord, Tabish v. State, 72 P.3d 584, 591 (Nev. 2003).

Finally, the acquittal on Count I, regarding J.H., does not necessarily mean that the jury considered the evidence in each case separately. The Court could "only speculate as to why the jury rendered varying conclusions as to the defendant's guilty" in the three cases. State v. Boscarino, 529 A.2d 1260, 1265 (Conn. 1987). Acquittals of some charges will not always mean that a defendant was not actually prejudiced when he went to trial on joined offenses where the evidence pertaining to each would not have been cross-admissible at separate trials. State v. Gallegos, 152 P.3d 828, 841 (N.M. 2007).

C. THE TRIAL COURT ERRED IN DENYING CORPRON'S MOTION FOR A NEW TRIAL. CORPRON'S CONSTITUTIONAL RIGHTS TO BE PRESENT WERE VIOLATED, AND REVERSAL OF THE CONVICTIONS IS WARRANTED.

The right of an accused person to be present at all critical stages of a criminal prosecution has long been guaranteed by the Confrontation Clause of the Sixth Amendment, and Article II, Section 24 of the Montana Constitution. State v. Mann, 2006 MT 160, ¶12, 332 Mont. 476, 139 P.3d 159, citing Illinois v. Allen, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The state constitutional

guarantee of one's right to be present is broader than the protection afforded under the federal constitutional clauses. See, Faretta v. California, 422 U.S. 806, 813 n. 10, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)(noting that Montana's constitution expressly recognizes the right to appear and defend in person *and* by counsel.)

The constitutional right to be present also is based on constitutional due process guarantees. Under the Due Process Clause of the Fourteenth Amendment, "a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). See also, State v. Matt, 2008 MT 444, ¶ 16, 347 Mont. 530, 199 P.3d 244 (the right to be present is also protected by the Fourteenth Amendment's due process clause).[11]

In addition to the fundamental right to be present at all critical stages, the defendant also has a fundamental constitutional right to a public trial. State v. Tapson, 2001 MT 292, ¶ 21, 307 Mont. 428, 41 P.3d 305.

1. Standard of Review. A district court's determination of whether a criminal defendant's right to be present at the critical stages of his trial is a question of law, which this Court reviews de novo. State v. Mann, 2006 MT 160, ¶

[11] Article II, § 17 of the Montana Constitution also guarantees due process.

10. The standard of review for the lower court's grant or denial of a motion for a new trial is whether the court abused its discretion. State v. Marker, 2000 MT 303, ¶ 13, 302 Mont. 380, 15 P.3d 373. A district court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous assessment of the facts. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990).

2. Corpron Had A Constitutional Right to be Present at the Hearing, and He Did Not Waive This Right.

The facts are not disputed. The judge met with the jurors in the jury room while they were deliberating, in Corpron's absence.

The defendant has the right to be present at all critical stages in the trial. A critical stage is any part of the proceeding where there is potential for substantial prejudice to the defendant. State v. Matt, 2008 MT 444, ¶ 17. The judge's meeting with the deliberating jury was a critical stage of the proceeding. State v. Tapson, 2001 MT 292, ¶ 33 (judge's meeting with jurors in jury room during deliberations violated defendant's rights to a public trial and to be present at all critical stages); accord, State v. Kennedy, 2004 MT 53, ¶ 26, 320 Mont. 161, 85 P.3d 1279 (judge's questioning of juror during trial a critical stage). In United States v. Touloumis, 771 F.2d 235, 242 (7th Cir. 1985), the court noted that two important

interests are undermined by a discussion between the judge and the jury in the jury room during deliberations: (1) the appearance of justice, and (2) allowing the parties to make a contemporaneous record as to the context in which the judge's remarks are made. In Matt, this Court held that perhaps the most obvious reason why a meeting between the court and counsel was a critical stage of trial was "the fact that every criminal defendant in this state has the constitutional right to appear and defend 'in person.'" There, as here, the defendant could have participated in the preservation of his rights, as by his physical presence he could hear and see the proceedings. He could have observed the demeanor of the trial judge, observed whether his attorney was advocating for him zealously and professionally, and these observations could have informed his decision to pursue an ineffective assistance of counsel claim. Id., at ¶ 21.

Whether defense counsel agreed to let the judge discuss these topics with the jury is immaterial. The right to appear and defend "is a fundamental right which may only be waived through an informed, intelligent, and recorded waiver." Mann, at ¶ 12. If the defendant chooses to waive that right, the court must obtain an on-the-record personal waiver by the defendant acknowledging that the defendant voluntarily, intelligently and knowingly waives that right. State v. Bird,

2002 MT 2, ¶ 38, 308 Mont. 75, 43 P.3d 266. No such waiver was obtained in this case.

3. The Violation of Corpron's Constitutional Right to be Present Was Not Harmless.

The district court erred in considering the jurors' affidavits over the defense's objection. Rule 606(b), M.R.Evid., prohibits testimony and affidavits of jurors for the purpose of impeaching the jury's verdict. State v. Marker, 2000 MT 303, ¶ 15; see also, United States v. Alexander, 110 F.Supp.2d 762, 766 n. 6 (D. Ill. 2000). The purpose of this rule is to ensure that jurors are able to deliberate and make decisions free from frivolous and recurrent invasions of their privacy by disappointed litigants. State v. Lawlor, 2002 MT 235, ¶ 10, 311 Mont. 493, 56 P.3d 863. "Testimony of the jurors to impeach their own verdict is excluded not because it is irrelevant to the matter in issue, but because experience has shown that it is more likely to prevent than to promote the discovery of the truth." Marker, 2000 MT 303 at ¶ 15.

Under Rule 606(b), M.R.Evid., "***the affidavit of a juror cannot be admitted to show*** anything relating to what passed in the jury room during the investigation of the cause, or ***the effect of a colloquy between the court and a juror***, or the arguments made to a juror by a fellow juryman." Marker, 2000 MT 303 at ¶ 15

(emphasis added) (citation omitted). Similarly, the Court held in Lawlor that juror affidavits may not be used to impeach a verdict based upon internal influences on the jury. 2002 MT 235, ¶ 10; accord, Stebner v. Alside, 2010 MT 138, ¶ 16, ___ Mont. ___, ___ P.3d ___. In State v. Hocevar, 2000 MT 157, 300 Mont. 167, 7 P.3d 329, this Court held that communication between jurors and the judge constituted an internal process, and affirmed the trial court's rejection of a juror's post-verdict affidavit under Rule 606(b). There, the jury sent several notes to the court during deliberations, regarding an individual juror. The defendant later moved for a new trial, and submitted an affidavit from the juror who was the subject of the notes. The trial court granted the state's motion to strike that affidavit, and this Court affirmed, holding that the notes to the court constituted an internal process, and did not introduce an outside or extraneous element into the deliberative process. The affidavit was prohibited by Rule 606(b). 2000 MT 157, at ¶ 41.

Thus, the jurors' affidavits should not have been considered, to the extent that the jurors purported to discuss the effect of the judge's discussion with the jury during deliberations. The court erred in relying on these inadmissible affidavits to hold that Corpron was not prejudiced.

The violation of Corpron's constitutional rights was not harmless. In Matt, which was decided after the lower court denied Corpron's motion for new trial, this Court announced the test for analyzing whether a violation of one's constitutional right to be present constitutes harmless error. The Matt test was recently applied, in Becker v. State, 2010 MT 93, 356 Mont. 161, ___ P.3d ___. Under this test, if the defendant's fundamental constitutional right to be present has been violated, prejudice is presumed. If, under the circumstances of the particular case, the violation of the right to be present constitutes structural defect, then the presumption of prejudice is conclusive. A structural error is one which affects the framework within which the trial proceeds or necessarily renders the trial fundamentally unfair. Matt, at ¶¶ 38, 43.

If the violation is a trial defect, then the state has the burden to rebut the presumption by showing there is no reasonable possibility the violation prejudiced the defendant in light of the interests the right to be present was designed to protect. Matt, at ¶ 38. This Court has concluded that meetings between the court and counsel, held in the defendant's absence, constitutes trial error. Matt, ¶ 43; State v. Godfrey, 2009 MT 60, ¶¶ 27-32, 349 Mont. 335, 203 P.3d 834; Becker v. State, 2010 MT 93, ¶ 14.

This case presents a scenario in which both defense counsel and the accused were not present when the judge met and had discussions with the jury during deliberations. The Supreme Court noted, in United States v. United States Gypsum Co., 438 U.S. 422, 460, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978) that "[a]ny ex parte meeting or communication between the judge and the foreman of a deliberating jury is pregnant with possibilities for error."). Similarly, in United States v. Smith, 31 F.3d 469, 471 (7th Cir. 1994), the court held that "the unusual practice of a judge entering the jury room to speak privately with jurors is almost certain to run afoul of a defendant's right to be present during trial proceedings."

If this Court concludes the error in this case was trial error, the state must prove, without reference to the inadmissible juror affidavits, that there is no reasonable possibility the violation prejudiced Corpron in light of the interests the right to be present and the right to a public trial were designed to protect.

In Godfrey, the state satisfied this burden. There, the court and counsel discussed inquiries from the jury. This Court noted that the information the court could share with the jury was limited to that which the jury had already heard. Any prejudice by virtue of evidentiary rulings had already occurred. The court's response to the inquiries was limited to releasing to the jury limit transcript excerpts, with the admonition that the jury must consider the evidence in its

entirety. Id., at ¶ 36. In Becker the court's response to a jury inquiry referred the jury to a jury instruction, which had been settled in Becker's presence. The Court found this error to be harmless. Id., at ¶ 14.

Corpron's issue is presented in a different context. This is not a case in which the court merely redirected the jury to consider evidence already admitted, based on rulings already made. This is not a case in which counsel was present. On these facts, the error was not harmless.

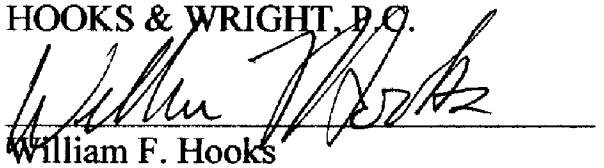
VI. CONCLUSION

Reversal of the convictions is warranted, for the reasons discussed. The trial court erred in joining the charges for trial. Alternatively, if the charges were properly joined, the court erred when it denied Corpron's motion to sever the charges.

The court likewise erred when it denied Corpron's motion for a new trial, based on impermissible contact between the judge and the jury during deliberations. Corpron's constitutional rights to be present at all critical stages and to a public trial were violated.

Dated this 25th day of June, 2010.

HOOKS & WRIGHT, P.C.

By: 

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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0081

STATE OF MONTANA,

Plaintiff and Appellee,

v.

STEVEN CORPRON,

Defendant and Appellant.

APPENDIX TO APPELLANT'S BRIEF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Appellant's Brief was served on counsel of record by depositing a true and correct copy in the U.S. mail, postage prepaid, on the 25th day of June, 2010, and addressed as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Appellant's Brief is printed with a proportionately spaced Times New Roman non-script text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and the word count calculated by WordPerfect 10.0 for Windows, in addition to a manual count of the words contained in footnotes, totals 9,898 words, excluding table of contents, table of authorities, certificate of service and certificate of compliance.

Dated this 25th day of June, 2010.